SUPREME COURT OF THE UNITED STATES

In the Matter of the Petition of BERNADINE WARREN, for a writ of certiorari directed to the Circuit Court of Appeals for the Third Circuit to bring before the Supreme Court the case of

BERNADINE WARREN, administratrix ad prosequendum of the Estate of Harry Edward Warren, deceased,
Plaintiff-Appellant,

against

RICHARD E. HAINES, trading as Annandale Creamery Co.,
Defendant-Respondent.

SUPPORTING BRIEF.

Basis for the Court's Jurisdiction.

This application for a writ of certiorari is made pursuant to the provisions of Rule 38, subdivision 5 of the Supreme Court Rules which provides in substance that a petition may be granted where there are special and important reasons therefor: (a) where a Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local conditions; and (b) where the said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision; and (c) where the said Court has decided an important question of general law probably untenable or in conflict with the weight of authority.

POINT I.

In disregard of the common law of New Jersey as expressed in several decisions of its highest court herein cited, the Circuit Court of Appeals has approved the refusal of the Trial Court to submit to the jury the questions of proximate cause and contributory negligence.

The Circuit Court of Appeals in its opinion has expressly conceded that the plaintiff has presented sufficient proof to go to the jury in relation to the negligence of the defendant. It recognizes that the defendant's truck was coming down hill at the place of collision, in violation of the statute as to speed, and of the statute which required drivers to keep to the right of the center of the road, and it says that such violations may be considered in determining whether the defendant is negligent (R., p. 49).

So far as the plaintiff's intestate's action was concerned, it is conceded that he was driving his Pontiac car up the hill on the right side of the road and that a few seconds before and at the time of the collision the defendant was on the wrong side of the road, but the Circuit Court although admitting defendant's negligence takes the position that it is a matter of law and not a question of fact for the jury whether, when the deceased had all but one foot on his own ten feet wide section of paved road upon which to operate his Pontiac car he was not obligated to avoid a collision with the defendant's truck which was operated on the wrong side of the road. As matter of law they rule he was so obligated. The plaintiff insists this is a jury question (R., pp. 49, 50).

It is equivalent to saying that where a truck runs up on a sidewalk and strikes a pedestrian, it is a question of law for the court to determine whether or not the sidewalk

was wide enough to impose upon the pedestrian the duty of running away from the point where the truck came upon the sidewalk.

Furthermore, this is an action for wrongful death and under the decisions the question of contributory negligence is expressly reserved for the jury, just as under the decisions the question of proximate cause is reserved for the jury.

Immediately before the Circuit Court proceeds to rule that the question of proximate cause in this case was one for the court, it cites the case of *Podolsky* v. *Sautter,* 102 N. J. L. 598, which expressly says that the question of proximate cause is a question for the jury and not for the court.

A case where a collision similar to the one in the case at Bar was involved is *Parave* v. *Public Service Interstate Transportation Co.,* 109 N. J. L. 155, where there was a collision between a Ford car and a Bus proceeding in opposite directions. The negligence alleged there was an unlawful rate of speed without due regard for the rights and safety of other persons on the highway and negligently operating the Bus on the wrong side of the road so as to cause a collision.

In that case, too, there was only one witness who saw the Bus swing on to the wrong side of the road, and the court said that the testimony of this witness was sufficient to make out a prima facie case of negligence on the part of the operator of the Bus as the proximate cause of the accident.

So in the case at Bar, the testimony of the witness Hendershot was sufficient to make out a prima facie case for the jury as to the proximate cause of the accident.

In the case of *Belperche* v. *Erie RR. Co.,* 111 N. J. L. 81, Chief Justice Brogan of the New Jersey Court of Errors and Appeals, said:

> "This court has stated repeatedly that whether alleged negligence was the proximate cause of the damage done is generally a question for the jury" (p. 84).
>
> In this class of cases where negligence is charged, in that provisions of a statute or an ordinance have been violated, the question for the jury is whether such violation, if it existed, was in whole or part the proximate cause of the accident" (p. 87).

In *Burciar* v. *Public Service Coordinated Transport,* 127 N. J. L. 424, the court said:

> "While in such an action as this a plaintiff must prove circumstances which render it probable and not merely possible, that the defendant was at fault, he is not required to exclude beyond doubt the inference that the damage was due to a cause for which the defendant was not responsible. All that is required is that the circumstances should be so strong that a jury might properly on grounds of probability, rather than of certainty, exclude the inference favorable to the defendant. The test is probability rather than certainty."

In the case at Bar it cannot be disputed that there were plenty of facts in evidence to show that the probable cause of the accident resulted from the fact that the defendant violated the ordinance and that his truck was proceeding down the hill with its front wheels on the left side of the road in the path of the plaintiff's intestate's car (R., pp. 48, 49). This, coupled with the fact that the left side was sheared off his car, and plaintiff's intestate was forced over to its right side of the road, was ample evidence to warrant submission to the jury of the issues in this case, and the court had no right to grant a dismissal (R., pp. 20, 22).

The Circuit Court of Appeals in its opinion completely ignores the case of *Hammersma, Admx.* v. *Smith,* 110 N. J. L. 523, which was most strongly called to its atten-

tion at the time of argument and in the brief below. In that case the evidence was not as strong as the evidence in the case at Bar and yet the Court of Errors and Appeals of the State of New Jersey said that a submission of the issues to the jury was entirely proper, and there was no error in denying a non-suit and directing a verdict.

The court's attention was also called to the case of *Jackson* v. *D., L. & W. RR. Co.,* 111 N. J. L. 487, where there were no eye witnesses to the exact manner in which the death of the plaintiff's intestate was caused. In that case the Court of Errors and Appeals said that there was sufficient evidence to go to the jury, and that there is a presumption against both suicide and negligence (p. 492).

In the case of *Silverstein* v. *Schneider,* 110 N. J. L. 239, the accident involved injuries to the plaintiff by being struck with a truck which ran up on the sidewalk and hit him. This truck was being towed by the defendant Schneider to the garage of its owner. A rope that was being used to tow the truck broke causing the injury. It was claimed that the defendant Schneider was guilty of no negligence which was the proximate cause of the accident—the court said:

> "Whether or not the proximate cause of the injuries was the result of the negligent operation of Schneider or Middleton—or of them both jointly is a jury question and a verdict will not be directed unless the facts are undisputed and the inference one that is so plain that fair minded men would not disagree about it. *Podolsky* v. *Sautter,* 102 N. J. L. 598 (p. 243).
>
> Under the facts developed in this case it was not for the court to say or even suggest what was the proximate cause of the happening. The proximate cause is that affirmative act or omission which directly brought about the happening complained of and in the absence of which the happening complained of would not have occurred. What was the

proximate cause here—the breaking of the tow rope, the failure of the hydraulic brakes, the jerks and starts of the towing automobile, the undue speed, the sharpness of the right hand turn—any one or all of these may answer our question, but under our system of jurisprudence it is for the jury to say and the court properly placed it in their hands for determination" (p. 244).

See also

McKittrick v. *Dugan Bros. of N. J.*, 119 N. J. L. 605-607;

Rizio v. *Public Service Elec. & Gas Co.*, 23 Atl. 2d, 585.

In the case at bar it was not for the court to say on a motion to dismiss whether the plaintiff's deceased husband riding on the right side of the road should have avoided the accident because he had all but one foot of his own ten feet wide section of paved road upon which to operate the Pontiac car (R., p. 49). It was not for the court to say that there was nothing to show that his vision was obstructed, or that his side of the road was not crowded with other vehicles; or that there was no evidence that the defendant's truck cut into the path of the Pontiac (R., pp. 49, 50).

As a matter of fact it is conceded by the court that the defendant's truck was over the center line and on the Pontiac's side of the road at the time of the collision (R., p. 49); an eye witness saw the collision, and it is surely a question for the jury whether that collision was the fault of the deceased, or the fault of the defendant (R., pp. 18, 19).

On the question of contributory negligence in a death case the attention of the court below was directed to the case of *McConachy exec.* v. *Skalerew*, 113 N. J. L. 17, where the Court of Errors and Appeals said:

"In order to justify a non-suit the contributory negligence of the testatrix cannot be in doubt. If,

> however, doubt exists, the determination of the question is for the jury and not for the court. Contributory negligence is a matter of defense and the plaintiff is not required to prove its absence as a part of her case. No presumption of negligence upon the part of the decedent arises in such an action from the mere occurrence of the accident."
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> *Danskin* v. *Penn. RR.*, 79 N. J. L. 526.

All these cases show that there was a question for the jury and that the courts below have disregarded these cases in violation of their duty.

It is hardly necessary to call to this court's attention the recent case of *Erie RR. Co.* v. *Tompkin*, 304 U. S. 64, where a writ of certiorari was granted because of the importance of the question of whether the Federal Court was free to disregard the rule of the Pennsylvania common law. This court said:

> "Except in matters governed by the federal constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute, or by its highest court in a decision is not a matter of federal concern" (p. 78).

The courts below in the case at bar have completely ignored the rule laid down by the highest court of the State of New Jersey which requires that in a case such as the present the issues of proximate cause and contributory negligence be submitted to the jury.

This court in a contract case granted a writ of certiorari where it was evident from a short statement of the dominant facts as they might have been found that sufficient was shown to entitle the plaintiff to go to the jury.

Simmons v. *Swan*, 275 U. S. 113.

The dominant facts here are that the plaintiff's intestate was proceeding upgrade in a westerly direction at the same time the defendant was proceeding downgrade in an easterly direction with a load of 24 tons of milk (R., pp. 36, 43). Both of the cars were on a straightaway; the defendant was proceeding at a rate of speed of 45 miles per hour, although the local limit at the point was 20 miles per hour, and also had its wheels one foot over the center line of the road in violation of the ordinance requiring defendant to keep to the right of the center (R., p. 49).

The plaintiff's intestate was concededly on the right side of the road and the two cars collided so that the right front wheel of the truck came off and the whole side of the Pontiac sedan was sheared off, causing the Pontiac sedan to go off to its right on the right side of the road and bringing about the death of plaintiff's intestate (R., pp. 18, 20, 22).

If the evidence which was offered by the defendant below is considered, definite questions of fact are injected into the case by the contradictions between the testimony of the plaintiff's witness Hendershot, and the defendant's driver and driver's helper, because both of these men claim that the truck was not over the center of the road, and both had other inconsistencies in their testimony (R., pp. 36-43, 43-45).

It therefore seems clear that the courts below were in error in their refusal to permit the submission of this case to the consideration of the jury.

A recent case in the Court of Appeals of the State of New York is eloquent on the reasons why a case of this character should be submitted to the jury.

Lee v. *City Brewing Corporation,* 279 N. Y. 380.

POINT II.

Because the right to a jury trial is an important right, and because in a death action such as the present the widow and children should not be prevented from having their rights passed on by the jury, the Court should allow a writ of certiorari as prayed for.

Respectfully submitted,

RICHARD J. MACKEY,
Attorney for Petitioner.